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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE**

ENOCH ADAMS, JR., LEROY ADAMS,
ANDREW KOENIG, JERRY NORTON
DAVID SWAN and JOSEPH SWAN,

Plaintiffs.

V.

TECK COMINCO ALASKA INCORPORATED

Defendant.

Case No. A04-49 (JWS)

PLAINTIFFS' OBJECTIONS TO TECK COMINCO'S LIABILITY WITNESS LIST AND MOTIONS IN LIMINE TO EXCLUDE WITNESSES AND EVIDENCE THAT IS NOT RELEVANT (Evidence Code §402)

NANA REGIONAL CORPORATION and
NORTHWEST ARCTIC BOROUGH,

Intervenors-Defendants.

PLAINTIFFS' OBJECTIONS TO WITNESS LIST AND MOTIONS TO EXCLUDE WITNESSES

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1 **I. WITNESSES AT THE LIABILITY PHASE OF TRIAL MUST TESTIFY ABOUT**
 2 **ISSUES RELEVANT TO LIABILITY.**

3 The Clean Water Act is a strict liability statute. 33 U.S.C. § 1311(a); *Hawaii's Thousand*
 4 *Friends v. City and County of Honolulu*, 821 F. Supp. 1368, 1392 (D. Ha. 1993). At issue during
 5 the liability phase are the questions, 1) did the alleged violations of Teck Cominco's permit
 6 conditions take place? And 2) if so, are they ongoing or capable of repetition? *See Enoch*
 7 *Adams, et al. v. Teck Cominco Alaska, Inc.*, 396 F. Supp.2d 1095, 1099 (D. Ak. 2006). A great
 8 majority of the violations have already been admitted by Teck Cominco in its discharge
 9 monitoring reports (DMRs) filed with EPA and in its Answer and other pleadings filed in this
 10 case; the central issue for monthly TDS, daily cyanide, monthly cyanide, daily whole effluent
 11 toxicity (WET) and monthly WET violations is whether the violations are ongoing.

12 These violations and their ongoing nature will be proven by documentary evidence such
 13 as the DMRs filed by Teck Cominco and the Compliance Orders by Consent (COBCs) entered
 14 into by Teck Cominco. These documents will, on their face, demonstrate both the violations and
 15 their ongoing nature. *See, e.g.*, Exhibit 1 to Declaration of Luke Cole in Support of Motion in
 16 Limine to Preclude Testimony (“Cole dec.”) (excerpt of October 2007 DMR reporting daily and
 17 monthly cyanide violations); Exhibit 2 to Cole dec. (excerpt of 2006 COBC attesting, over Teck
 18 Cominco’s signature, that, “At times during the months of ... May-June 2004, and May-June
 19 2005, Teck Cominco violated the TDS effluent limits in Part I.A.1 of the 1998 Permit”).

20 Despite the narrow issues at trial – strict liability for those proven violations, and
 21 resolution of the question of whether the violations are ongoing or capable of repetition – Teck
 22 Cominco presents this Court with a list of 45 witnesses it anticipates calling at trial, the vast
 23 majority of them, it discloses, to testify about subjects wholly apart from permit violations and

1 whether or not they are ongoing. Some witnesses are offered to discuss the conditions at
2 Kivalina, some are Teck Cominco employees apparently prepared to explain why certain
3 violations happened. Many witnesses are laboratory personnel offered to discuss the results of
4 their lab tests – lab tests which, by stipulation of the parties, are all already fully admitted and in
5 no need of authentication. Two U.S. Environmental Protection Agency (“EPA”) staffers are
6 offered to talk about the COBCs, although the COBCs are not relevant to liability here. Two
7 witnesses are even offered to give the *State of Alaska’s* “perspective” on this federal suit to
8 enforce a federal permit under the federal Clean Water Act!

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10
11 This parade of witnesses is not only unnecessary, the vast majority of the testimony
12 proffered by Teck Cominco through these witnesses is simply not relevant to liability. As
13 explained below, the conditions at Kivalina are not relevant to Teck Cominco’s liability. The
14 opinions of state officials are not relevant to Teck Cominco’s liability. The opinions of random
15 EPA staff are not relevant to Teck Cominco’s liability. The testimony of lab technicians as to the
16 results of their tests are not relevant, particularly when the lab results themselves are not in
17 dispute and are their own best evidence. The testimony of Teck Cominco employees explaining
18 the reasons for non-compliance is not relevant under the strict liability of the Clean Water Act.
19 And the testimony of Teck Cominco employees as to topics other than Teck Cominco’s permit
20 violations, and whether or not they are ongoing, is not relevant at the liability phase.

21
22 Through this set of objections to Teck Cominco’s Liability Phase Witness List and
23 motions in limine to exclude irrelevant testimony and witnesses, the Adams plaintiffs attempt to
24 restore some focus to the trial proceedings at the liability phase. The great majority of Teck
25 Cominco’s proffered witnesses – 33 of the 45 – can be excluded entirely on relevance grounds
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1 alone, and the testimony of the remaining witnesses should be strictly limited to issues actually
2 relevant to liability. Adams respectfully requests, through this motion and others filed
3 simultaneously with it, that the Court assert its control over the trial process and preclude the
4 carnival of irrelevance that Teck Cominco apparently envisions and proposes as its portion of
5 trial's liability phase.

7 **II. LEGAL STANDARD**

8 Rule 402 of the Federal Rules of Evidence states, "Evidence which is not relevant is not
9 admissible." This is the critical benchmark for our inquiry into Teck Cominco's proffered
10 witnesses and the testimony Teck Cominco describes they will be giving in this Clean Water Act
11 enforcement suit at the liability phase.

12 The Clean Water Act was designed to lend itself to speedy and simple enforcement. It is
13 a strict liability statute: to establish a violation of the Act, a plaintiff need only prove that the
14 defendant violated the terms and conditions of its NPDES permit. *See* 33 U.S.C. § 1311(a),
15 1342(k); *see also Hawaii's Thousand Friends v. Honolulu*, 821 F. Supp. 1368, 1392 (D.Haw.
16 1993) ("Courts throughout the country have held that NPDES compliance is a matter of strict
17 liability and a defendant's intent and good faith are irrelevant"); *Sierra Club v. Union Oil Co. of*
18 *Cal.*, 813 F.2d 1480, 1490-1491 (9th Cir. 1988), *vacated for reconsideration*, 485 U.S. 931
19 (1988), *reinstated & amended*, 853 F.2d 667 (9th Cir. 1988) ("*Sierra Club*") (whether violations
20 are de minimis, "technical," "rare" or insignificant is irrelevant to liability); *Mumford Cove Ass'n*
21 *v. Town of Groton*, 640 F. Supp. 392, 395 (D.Conn. 1986) (fault, intent and environmental harm
22 are relevant only with respect to remedies).

1 **III. THE CONDITIONS AT KIVALINA ARE NOT RELEVANT TO TECK
2 COMINCO'S LIABILITY.**

3 The conditions at Kivalina and elsewhere in the Wulik River watershed are not at issue in
4 the liability phase.¹ Nor are NANA's actions. Thus, as explained more fully below, Adams
5 respectfully objects to the testimony of and moves in limine to preclude the following listed
6 witnesses from testifying at the liability phase at trial: Roland Booth, Bert Adams, Sr., Theodore
7 Booth, Alvin G. Ott and Joyce Tsuji.

8 **A. The testimony of Roland Booth is not relevant.**

9 Teck Cominco lists Mr. Booth on its witness list with the following description:

10 Roland Booth is a resident of Noatak. He is expected to testify regarding his observations
11 of the availability, location, quantity and quality of subsistence resources over the years
12 near and around Kivalina. He is also expected to testify regarding his observations on
13 issues related to the drinking water in Kivalina. Mr. Booth is expected to testify
14 regarding his knowledge of NANA's work to preserve the region's subsistence resources
15 and his work with the Red Dog Mine subsistence committee.

16 Liability Phase Witness List at 2. None of the proffered subjects – subsistence resources and
17 drinking water at Kivalina, and NANA's work – are in any way relevant to the issues to be
18 proven at the liability phase, violations of Teck Cominco's permit and whether or not they are
19 ongoing. Accordingly, Mr. Booth should be precluded from testifying.

20 **B. The testimony of Bert Adams, Sr. and Theodore Booth is not relevant.**

21 To the extent that the conditions at Kivalina are relevant at all in this litigation, it would
22 be to decide the threshold issue of standing. That threshold has been crossed. As the Court ruled
23 in this case, "plaintiffs have satisfied Article III's requirements and have standing to bring this
24 action." Order and Opinion, Docket 136 at 8. Thus, such testimony is not relevant, period.

25 Furthermore, even if standing were at issue (which it is not), the testimony of non-parties
26 such as Messrs. Booth, Mr. Bert Adams, Dr. Ott and Ms. Tsuji would not be relevant to the
27 experiences and perceptions of the individual plaintiffs. Standing is determined by the injury in
28 fact to a litigant, not the perceptions of a non-party.

1 Teck Cominco describes Mr. Adams's and Mr. Theodore Booth's testimony in identical
2 language to two of the sentences used to describe Roland Booth's testimony:
3

4 He is expected to testify regarding his observations of the availability, location, quantity
5 and quality of subsistence resources over the years near and around Kivalina. He is also
6 expected to testify regarding his observations on issues related to the drinking water in
Kivalina.

7 Liability Phase Witness List at 2. Neither of the proffered subjects – subsistence resources and
8 drinking water at Kivalina – are relevant to the issues to be proven at the liability phase.

9 Accordingly, Mr. Adams and Mr. Booth should be precluded from testifying.

10 **C. The testimony of Alvin G. Ott is not relevant.**

11 Teck Cominco offers Dr. Ott with the following description:

12 Dr. Ott is with the Office of Habitat Management and Permitting in the Department of
13 Natural Resources for the State of Alaska. Dr. Ott is an expert in aquatic life in
14 Northwest Alaska, having conducted a number of studies of the subject in and about the
15 Red Dog Mine. Dr. Ott will testify to his work designing, implementing and supervising
16 a bio-assessment program in the waters downstream from Red Dog Mine, the effects of
17 natural mineralization on aquatic life, the lack of significant effects caused by the mine,
18 and will otherwise testify consistent with his declarations in this case and the case of
KRPC v. Teck Cominco, A:02-231 CV (JWS), as well as studies he has authored relative
to aquatic life in the DeLong Mountain Region.

19 Liability Phase Witness List at 2-3. As with Mssrs. Booth and Mr. Adams, above, none of the
20 proffered testimony is relevant to the liability phase, which is focused solely on violations of
21 Teck Cominco's permit and whether or not they are ongoing and capable of repetition.

22 Accordingly, Dr. Ott should be precluded from testifying.

23 **D. The testimony of Joyce Tsuji is not relevant.**

24 Teck Cominco offers Ms. Tsuji with the following brief and non-specific description: "A
25 retained expert. Will testify consistent with her report and supplemental report, and work
26 performed by Exponent for Red Dog Mine." Liability Phase Witness List at 3. Although not
27

1 revealed by this description, Ms. Tsuji's "report and supplemental report" both discuss human
 2 health and drinking water in the Wulik River. Cole dec. ¶4. As discussed above, such testimony
 3 is simply not relevant to the liability phase, which is focused solely on violations of Teck
 4 Cominco's perm and whether or not they are ongoing and capable of repetition. Further, not one
 5 of the 802 exhibits offered by Teck Cominco, or the 52 joint exhibits lodged by the parties, are
 6 authored by Exponent. Cole dec. ¶5. There is nothing to work from to uncover the relevance of
 7 "work performed by Exponent for Red Dog Mine," and nothing in Tsuji's reports about
 8 violations or their ongoing nature. Accordingly, Ms. Tsuji should be precluded from testifying.
 9 (Plaintiffs are separately moving to preclude Ms. Tsuji's testimony because of Teck Cominco's
 10 failure to disclose her testimony with the requisite specificity.)

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**IV. THE OPINIONS OF STATE ENVIRONMENTAL OFFICIALS ARE NOT
 14 RELEVANT TO LIABILITY UNDER THE FEDERAL CLEAN WATER ACT
 15 AND TECK COMINCO'S FEDERAL PERMIT.**

16 This case is brought under the federal Clean Water Act and concerns only violations of
 17 federal permits issued by the U.S. EPA. The meaning of a NPDES permit is a question of law
 18 for the court to decide. See *California Public Interest Research Group v. Shell Oil Co.*, 840 F.
 19 Supp. 712, 716 (N.D. Cal. 1993) ("Shell Oil"). "In construing NPDES permits, courts often
 20 defer to the agency *that drafted the permit*, consistent with established rules of statutory
 21 construction that give deference to agency interpretations where they are reasonable." *Id.*
 22 (emphasis added). The NPDES permits in question here were drafted by the federal EPA, not by
 23 the state of Alaska. The opinions of state officials are thus not relevant to liability here, and, as
 24 more fully explained below, Adams objects to and moves in limine to preclude the testimony of
 25 Nancy Sonafrank and Sharmon Stambaugh.
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1 **A. The testimony of Nancy Sonafrank is not relevant.**

2 Teck Cominco lists Nancy Sonafrank as a witness, with the following description:

3 The Section Manager for Water Quality Standards within the AK Department of
4 Environmental Conservation, Ms. Sonafrank will testify as to relevant water quality
5 standards and aquatic life criteria, including cyanide, and the use of the WAD testing
6 method.

7 Liability Phase Witness List at 6. In this case, Adams has alleged violations of Teck Cominco's
8 effluent limitations (that is, end-of-pipe permit limits) for Total Cyanide. Supplemental
9 Complaint, Docket 174 at ¶¶79-85. There are no allegations of violations of water quality
10 standards or aquatic life criteria, nor any allegations of violations of WAD cyanide tests. Thus,
11 any testimony "as to relevant water quality standards and aquatic life criteria, including cyanide,
12 and the use of the WAD testing method," is not relevant – none of it addresses the violations of
13 the effluent limitations for *Total Cyanide*, which are at issue here. Further, the opinions of a state
14 official on the contents or requirements of a federal permit are likewise not relevant: the permit
15 speaks for itself, and any interpretation of the permit conditions is solely the province of this
16 Court, not an official from a state agency. Thus, no testimony that Ms. Sonafrank is described as
17 giving would be relevant, and Adams moves to preclude the testimony of Nancy Sonafrank.

18 **B. The testimony of Sharmon Stambaugh is not relevant.**

19 Teck Cominco states that Sharmon Stambaugh "Will testify as to the compliance and
20 monitoring of Red Dog wastewater discharges from the perspective of the AK Dept. Of
21 Environmental Conservation." Liability Phase Witness List at 6. As with Ms. Sonafrank, the
22 opinions of a state official, her "perspective" on the contents or requirements of a federal permit
23 and Teck Cominco's compliance with it, are simply not relevant: the permit speaks for itself, and
24 any interpretation of the permit conditions is solely the province of this Court, not an official
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1 from a state agency. Teck Cominco's compliance with the permit is at issue at trial, but Ms.
 2 Stambaugh's opinions on that compliance are simply not relevant to Teck Cominco's liability
 3 under the federal Clean Water Act. Thus, no testimony that Ms. Stambaugh is described as
 4 giving would be relevant, and Adams moves to preclude the testimony of Sharmon Stambaugh.
 5

6 **V. EXCUSES AND EXPLANATIONS OF WHY TECK COMINCO FAILED TO
 7 COMPLY ARE NOT RELEVANT UNDER THE STRICT LIABILITY REGIME
 8 OF THE CLEAN WATER ACT.**

9 Again, the Clean Water Act is a strict liability Act. *Hawaii's Thousand Friends v. City*
 10 *and County of Honolulu*, 821 F. Supp. 1368, 1392 (D. Ha. 1993). As such, even if Teck
 11 Cominco's violations had been "de minimis" or "rare" and faultless – which they are not – Teck
 12 Cominco would still be liable for those violations. Courts throughout the country have held that
 13 NPDES compliance is a matter of strict liability, and a defendant's intent and good faith are
 14 irrelevant to the liability issue. *Id.* (citing *Stoddard v. Western Carolina Regional Sewer*
 15 *Authority*, 784 F.2d 1200, 1208 (4th Cir.1986) and *Atlantic States Legal Foundation v. Tyson*
 16 *Foods*, 897 F.2d 1128, 1142 (11th Cir.1990)). Under the Clean Water Act, fault only becomes
 17 relevant at the penalty phase.
 18

19 Based on information provided by Teck Cominco about the testimony it expects to elicit
 20 from witnesses for trial, it appears that many of the witnesses are offered in an attempt to
 21 minimize the significance of the Clean Water Act's requirements. This message is
 22 fundamentally contrary to the spirit of the Clean Water Act. The Act strikes a delicate balance
 23 between the environment and commercial and other human interests. It recognizes that very
 24 serious environmental harms can often be very difficult to perceive; hence its prohibition against
 25 the discharge of pollutants except as authorized by a NPDES permit. 33 U.S.C. §§ 1311(a), 1342;
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1 *Sierra Club*, 813 F. 2d at 1483.

2 Teck Cominco offers a series of witnesses in what appears to be an attempt to explain its
3 noncompliance. Good faith and substantial compliance are irrelevant as defenses at the liability
4 phase of a Clean Water Act case such as this one. *Shell Oil*, 840 F. Supp. at 714 (“[Because the
5 CWA imposes strict liability for any violation of a NPDES permit], neither good faith,
6 impossibility, nor reporting errors, are accepted as valid defenses to liability”); *Sierra Club*, 813
7 F.2d at 1491 (rejecting the substantial compliance defense). Testimony in this vein is irrelevant
8 and should therefore be precluded at this stage of litigation, and, as more fully explained below,
9 Adams objects to and moves in limine to preclude the testimony of Wayne Hall, Chuck
10 Hingsbergen, John Key, Ed Koon, Jackie Lundberg, Keith Malone, John Martinisko, Robert
11 Napier and Mike Schierman.

12 **A. The testimony of Wayne Hall is not relevant.**

13 Teck Cominco discloses that “Mr. Hall will testify as to facts involving alleged
14 excursions with which he was involved, policies and procedures at Red Dog, permitting history
15 and compliance.” Liability Phase Witness List at 5. Here, however, Teck Cominco’s liability
16 will be established by its admissions to the EPA through its DMRs. Mr. Hall’s explanations of
17 the “alleged excursions” have no bearing on the strict liability Teck Cominco faces – any reasons
18 or explanations for the violations are simply not relevant. *Shell Oil*, 840 F. Supp. at 714. Even
19 further from relevance at the liability stage are “policies and procedures at Red Dog, permitting
20 history and compliance.” Thus, no testimony that Mr. Hall is described as giving would be
21 relevant, and Adams moves to preclude the testimony of Wayne Hall.

22 **B. The testimony of Chuck Hingsbergen is not relevant.**

1 Teck Cominco discloses that “Mr. Hingsbergen will testify as to total suspended solids
2 and issues involving the DMTS port.” Liability Phase Witness List at 5. This Court has already
3 decided, at the summary judgment stage, the sole total suspended solids violation at the Port
4 alleged in the Complaint: “As defendant admitted both the TSS violation and the fact that it is
5 ongoing, plaintiffs’ motion for summary judgment is granted as to the port site TSS violation in
6 May 2002.” Docket 136. Thus, Mr. Hingsbergen’s testimony on total suspended solids cannot
7 be relevant. As to any remaining violations at the Port Site, Teck Cominco’s liability will be
8 established by its admissions to the EPA through its DMRs. Mr. Hingsbergen’s explanations of
9 “issues involving the DMTS port” have no bearing on the strict liability Teck Cominco faces.
10 *Shell Oil*, 840 F. Supp. at 714. Thus, no testimony that Mr. Hingsbergen is described as giving
11 would be relevant, and Adams moves to preclude the testimony of Chuck Hingsbergen.
12

13 **C. The testimony of John Key is not relevant.**

14 Teck Cominco discloses that “Mr. Key will testify as to the feasibility of various
15 treatment options for water at Red Dog.” Liability Phase Witness List at 5. The “feasability of
16 various treatment options” is, in the words of the *Shell Oil* court, “simply beside the point for
17 purposes of determining liability.” 840 F.Supp. at 718. Thus, no testimony that Mr. Key is
18 described as giving would be relevant, and Adams moves to preclude the testimony of John Key.
19

20 **D. The testimony of Ed Koon is not relevant.**

21 Teck Cominco discloses that Mr. Koon will “offer factual testimony relative to each of
22 the claimed violations occurring at the DMTS port.” Liability Phase Witness List at 5.
23 However, Teck Cominco’s liability will be established by its admissions to the EPA through its
24 DMRs. Mr. Koon’s explanations have no bearing on the strict liability Teck Cominco faces at
25

1 this phase of the trial. *Shell Oil*, 840 F. Supp. at 714. Thus, no testimony that Mr. Koon is
2 described as giving would be relevant, and Adams moves to preclude the testimony of Ed Koon.
3

4 **E. The testimony of Jackie Lundberg is not relevant.**

5 Teck Cominco discloses that “Ms. Lundberg will testify as to TIE/TRE and alleged port
6 excursions.” Liability Phase Witness List at 6. Although not disclosed by this abbreviated
7 description, “TIE/TRE” refers to Toxicity Identification Evaluation/Toxicity Reduction
8 Evaluation, which is a step required by Teck Cominco’s permits after a repeated violation of its
9 WET test permit limitations. Cole dec. ¶6. Because the TIE/TRE only happens after a violation,
10 it is not relevant to proving the violation itself. Further, Ms. Lundberg’s explanation of “alleged
11 port excursions” have no bearing on the strict liability Teck Cominco faces on those violations as
12 proven by its admissions to the EPA through its DMRs. *Shell Oil*, 840 F. Supp. at 714. Thus, no
13 testimony that Ms. Lundberg is described as giving would be relevant, and Adams moves to
14 preclude the testimony of Jackie Lundberg. (Plaintiffs are separately moving to preclude Ms.
15 Lundberg’s testimony because of Teck Cominco’s failure to disclose her testimony with the
16 requisite specificity.)

17 **F. The testimony of Keith Malone is not relevant.**

18 Teck Cominco discloses that Mr. Malone “will testify as to alleged excursions with which
19 he was involved, standard operating procedures, and cadmium in Red Dog water.” Liability
20 Phase Witness List at 6. Teck Cominco’s liability will be established by its admissions to the
21 EPA through its DMRs. Mr. Malone’s explanations of his involvement in the violations, or of
22 “standard operating procedures,” or even of cadmium “in Red Dog water” – whatever that may
23 be – have no bearing on the strict liability Teck Cominco faces. *Shell Oil*, 840 F. Supp. at 714.
24

1 Thus, no testimony that Mr. Malone is described as giving would be relevant, and Adams moves
 2 to preclude the testimony of Keith Malone.
 3

4 **G. The testimony of John Martinisko is not relevant.**

5 Teck Cominco discloses that “Mr. Martinisko will testify as to hold times, sampling,
 6 monitoring, and alleged excursions with which he was involved.” Liability Phase Witness List at
 7 6. Teck Cominco’s liability will be established by its admissions to the EPA through its DMRs.
 8 Mr. Martinisko’s explanations have no bearing on the strict liability Teck Cominco faces. *Shell*
 9 *Oil*, 840 F. Supp. at 714. Thus, no testimony that Mr. Martinisko is described as giving would be
 10 relevant, and Adams moves to preclude the testimony of John Martinisko.

11 **H. The testimony of Robert Napier is not relevant.**

12 Teck Cominco discloses that Mr. Napier “will testify as to factual events occurring with
 13 respect to alleged exceedances in 2007.” Liability Phase Witness List at 6. Teck Cominco’s
 14 liability will be established by its admissions to the EPA through its DMRs, however. Mr.
 15 Napier’s explanations of “factual events” have no bearing on the strict liability Teck Cominco
 16 faces. *Shell Oil*, 840 F. Supp. at 714. Thus, no testimony that Mr. Napier is described as giving
 17 would be relevant, and Adams moves to preclude the testimony of Robert Napier.

18 **I. The testimony of Mike Schierman is not relevant.**

19 Teck Cominco discloses that Mike Schierman “Will testify as to weather conditions at
 20 Red Dog as they pertain to claims, and their effects on monitoring, sampling, and transport of lab
 21 samples and results.” Liability Phase Witness List at 6. As noted above, the Clean Water Act is
 22 a strict liability statute, and thus “weather conditions” – presumably to be discussed in the
 23 context of explaining Teck Cominco’s failure to comply with its permit conditions, though not
 24

1 clear from the description offered by Teck Cominco – are simply not relevant to Teck Cominco's
 2 liability, to its permit violations, or to the question of whether or not those violations are
 3 ongoing. *Shell Oil*, 840 F. Supp. at 714. Thus, no testimony that Mr. Schierman is described as
 4 giving would be relevant, and Adams moves to preclude the testimony of Mike Schierman.
 5 (Adams is separately moving to preclude the testimony of Mr. Schierman because of Teck
 6 Cominco's failure to disclose his testimony with the requisite specificity.)

7

**VI. EXPLANATIONS OF LAB TESTS AND METHODOLOGIES ARE NOT
 9 RELEVANT.**

10 Defendants may not impeach their own DMRs. *See, e.g., Sierra Club*, 813 F.2d at
 11 1491-92; *United States v. CPS Chem. Co.*, 779 F. Supp. 437, 442 (D. Ark. 1991) (“[f]or
 12 enforcement purposes, a permittee's DMRs constitute admissions regarding the levels of effluents
 13 that the permittee has discharged” (citation omitted)); *Save Our Bays and Beaches v. City and
 14 County of Honolulu*, 904 F. Supp. 1098, 1138 (D. Haw. 1994) (city's noncompliance reports
 15 which it submitted pursuant to the CWA “constitute admissions of noncompliance which bind
 16 the defendant in this [enforcement] proceeding.”).

17 Liability in this case is governed by what Teck Cominco discharged, and what it reported
 18 to EPA that it discharged. The Ninth Circuit has held that DMRs are “conclusive evidence of an
 19 exceedance of a permit limitation.” *Sierra Club*, 813 F.2d at 1492. The DMRs, in some cases
 20 supported by the documentary lab results, are the best evidence as to what Teck Cominco
 21 discharged and reported to EPA. “[I]t is reasonable to preclude a permittee from impeaching its
 22 own DMRs during an enforcement action proceeding because the ‘NPDES program
 23 fundamentally relies on self-monitoring,’ and ‘allowing permittees to excuse their reported
 24 exceedances by showing sampling error would create the perverse result of rewarding permittees
 25

1 for sloppy laboratory practices.”” *Environmental Protection Information Center v. Pacific*
 2 *Lumber Company*, 430 F.Supp.2d 996, 1010 (“EPIC”), quoting *Sierra Club*, 813 F.2d at 1492;
 3 see also *Public Interest Research Group*, 361 F. Supp. 2d 1232, 1240-41.
 4

5 Teck Cominco lists a variety of witnesses who are apparently staffers at different
 6 laboratories. Any testimony by these staffers is simply not relevant under the caselaw in the
 7 Ninth Circuit. The lab results which were timely disclosed to the Adams plaintiffs from ACZ
 8 Lab, North Creek Analytical, ENSR, EVS Environmental Consultants, CH2M Hill, and
 9 Parametrix are all admitted in this case for both the liability and penalty phases, and thus there is
 10 no need for authentication or appearance by personnel from these labs. Further, there are
 11 personnel from other environmental consultant agencies listed although no exhibits or any other
 12 disclosures in the exhibits list mention them; these unmentioned consultants are Richard Brown
 13 of American Meteorburst Corp. and Greg Horner of Ecology and Environment.
 14

16 Thus, as explained more fully below, Adams respectfully objects to the testimony of and
 17 moves in limine to preclude the following listed witnesses from testifying at the liability phase at
 18 trial: Sue Barkey, Richard Brown, Stan Capps, Peter Chapman, David DeForest, James Dryden,
 20 Steven Eide, Greg Horner, Kevin Lackey, Kent Patton, David Pillard, Mike Prieve, Mike
 21 Stanoway, William Stubblefield, and Jason Weakley. (In the alternative, if this Court finds that
 22 any of their testimony is relevant – which it is not – then the testimony should be excluded as
 23 redundant as the lab reports are already in evidence.)
 24

25 **A. The testimony of Sue Barkey is not relevant.**

26 Teck Cominco offers Sue Barkey with the following description: “An employee of ACZ
 27 Lab, Ms. Barkey will testify as to effluent analysis, inorganic compounds and cyanide, and will
 28

1 discuss lab protocols [*sic*] and ACZ lab results.” Liability Phase Witness List at 3. As noted
 2 above, once Teck Cominco has submitted its DMRs to the EPA, the lab protocols are not
 3 relevant under the strict liability regime of the Clean Water Act. *EPIC*, 430 F.Supp.2d at 1010.
 4 Neither is explanation of the “effluent analysis, inorganic compounds and cyanide” as the ACZ
 5 lab results speak for themselves and are the best evidence. Thus, no testimony that Ms. Barkey is
 6 described as giving would be relevant, and Adams moves to preclude the testimony of Sue
 7 Barkey.
 8

9 **B. The testimony of Richard Brown is not relevant.**

10 Teck Cominco offers Richard Brown with the following description: “An employee of
 11 American Meteorburst Corp., Mr. Brown will testify as to auto-monitoring equipment and in-
 12 stream conductivity.” Liability Phase Witness List at 3. Adams is unable to find any exhibits
 13 among the 802 offered by Teck Cominco and the further 52 joint exhibits filed by the parties that
 14 are authored by (or indeed that even refer to) American Meteorburst Corp. Cole dec. ¶5.
 15 Further, none of the violations Adams will prove at trial – of TDS, cyanide and WET effluent
 16 limitations – involve auto-monitoring equipment or in-stream conductivity. Thus, no testimony
 17 that Mr. Brown is described as giving would be relevant, and Adams moves to preclude the
 18 testimony of Richard Brown.
 19

20 **C. The testimony of Stan Capps is not relevant.**

21 Teck Cominco discloses that “An employee of ENSR, Mr. Capps will testify as to WET
 22 testing methodology, laboratory procedures, and results.” Liability Phase Witness List at 3.
 23 Once Teck Cominco has submitted its DMRs to the EPA, WET testing methodology and
 24 laboratory procedures are not relevant because of the Clean Water Act’s strict liability. *EPIC*,
 25

1 430 F.Supp.2d at 1010. Further, any WET test results by ENSR speak for themselves, and are
2 already admitted as evidence. Thus, no testimony that Mr. Capps is described as giving would be
3 relevant, and Adams moves to preclude the testimony of Stan Capps.
4

5 **D. The testimony of Peter Chapman is not relevant.**

6 Teck Cominco discloses that “An employee of EVS Environmental Consultants, Dr.
7 Chapman will testify as to toxicology, TDS, WET and the effect of mine effluent on fish and
8 other aquatic life.” Liability Phase Witness List at 3. EVS conducted several WET tests used in
9 the DMRs, but such test results are themselves the best evidence. At the liability phase, there is
10 no place for testimony about “toxicology” nor about “the effect of mine effluent on fish and other
11 aquatic life.” Thus, no testimony that Dr. Chapman is described as giving would be relevant, and
12 Adams moves to preclude the testimony of Peter Chapman.
13

14 **E. The testimony of David DeForest is not relevant.**

15 Teck Cominco discloses that “Mr. DeForest will testify as to the analytical history of
16 WET testing, and laboratory caused apparent excursions of WET parameters.” Liability Phase
17 Witness List at 4. Under the Clean Water Act, the “analytical history of WET testing” and the
18 “laboratory caused apparent excursions of WET parameters” are simply not relevant to liability.
19 See *Shell Oil*, 840 F. Supp. at 714; *EPIC*, 430 F.Supp.2d at 1010. Thus, no testimony that Mr.
20 DeForest is described as giving would be relevant, and Adams moves to preclude the testimony
21 of David DeForest.
22

23 **F. The testimony of James Dryden is not relevant.**

24 Teck Cominco discloses that “A principal of Dryden Instruments, he will testify as to
25 field monitoring equipment used for NPDES monitoring and his consulting work in regard
26
27

1 thereto. He will testify to the conscientious nature of Teck Cominco's commitment to meeting
2 its obligations for monitoring." Liability Phase Witness List at 4-5. None of the violations
3 Adams will prove at trial – the TDS, cyanide and WET violations – involve "field monitoring
4 equipment" as all are effluent (end of pipe) limitations. Further, "the conscientious nature of
5 Teck Cominco's commitment to meeting its obligations for monitoring" is wholly irrelevant as
6 the Clean Water Act is a strict liability statute. See *Shell Oil*, 840 F. Supp. at 714. Thus, no
7 testimony that Mr. Dryden is described as giving would be relevant, and Adams moves to
8 preclude the testimony of James Dryden.

9

10 **G. The testimony of Steven Eide is not relevant.**

11

12 Teck Cominco discloses that "Mr. Eide, of CT&E Environmental Services, Inc., will
13 testify as to test protocols, issues involving the laboratory receiving station, inorganics, and hold
14 time logistics." Liability Phase Witness List at 5. Because the Clean Water Act is a strict
15 liability statute, none of these issues – test protocols, the laboratory receiving station, inorganics
16 and hold time logistics – are relevant to issues of liability. *EPIC*, 430 F.Supp.2d at 1010. Thus,
17 no testimony that Mr. Eide is described as giving would be relevant, and Adams moves to
18 preclude the testimony of Steven Eide.

19

20 **H. The testimony of Greg Horner is not relevant.**

21

22 Teck Cominco discloses that "Mr. Horner will testify as to studies performed by Ecology
23 and Environment." Liability Phase Witness List at 5. Adams is unable to find any exhibits
24 among the 802 offered by Teck Cominco and the further 52 joint exhibits filed by the parties that
25 are authored by Ecology and Environment. Cole dec. ¶5. Since liability will be established by
26 the documentary evidence, none of which include documents by Ecology and Environment, no
27

1 testimony that Mr. Horner is described as giving would be relevant, and Adams moves to
2 preclude the testimony of Greg Horner. (Adams is separately moving to preclude the testimony
3 of Mr. Horner because of Teck Cominco's failure to disclose his testimony with the requisite
4 specificity.)

5 **I. The testimony of Kevin Lackey is not relevant.**

6 Teck Cominco discloses that "Mr. Lackey will testify as to issues involving the Teck
7 Cominco laboratory facilities at Red Dog." Liability Phase Witness List at 5. However, "issues"
8 involving the lab have no bearing on liability under the strict liability of the Clean Water Act.
9 *EPIC*, 430 F.Supp.2d at 1010. Thus, no testimony that Mr. Lackey is described as giving would
10 be relevant, and Adams moves to preclude the testimony of Kevin Lackey. (Adams is separately
11 moving to preclude the testimony of Mr. Lackey because of Teck Cominco's failure to disclose
12 his testimony with the requisite specificity.)

13 **J. The testimony of Kent Patton and Mike Prieve is not relevant.**

14 Teck Cominco lists Kent Patton to "testify as to work performed by North Creek
15 Analytical, Inc." and Mike Prieve to "testify as to laboratory procedures, alleged cyanide
16 excursions, and work performed by North Creek Analytical." Liability Phase Witness List at 6.
17 As explained above, the best evidence of any testing done by North Creek Analytical is the test
18 result itself, and all timely-disclosed North Creek Analytical test results are already admitted
19 evidence in this matter. "Laboratory procedures" are not relevant to liability once Teck Cominco
20 has reported a violation in its DMR. *EPIC*, 430 F.Supp.2d at 1010. Thus, no testimony that Mr.
21 Patton or Mr. Prieve is described as giving would be relevant, and Adams moves to preclude the
22 testimony of Kent Patton and Mike Prieve.
23
24

1 **K. The testimony of David Pillard is not relevant.**

2 Teck Cominco discloses that David Pillard will “testify as to WET claims and WET
3 testing methodology and procedures.” Liability Phase Witness List at 6. Although Mr. Pillard’s
4 qualifications and affiliation are not disclosed, Teck Cominco’s earlier-filed witness list lists him
5 as as with ENSR out of Fort Collins, Colorado. Defendant Teck Cominco Alaska Incorporated’s
6 Final Witness List [Docket 29], at 15. As explained above, the best evidence of any WET testing
7 done by ENSR is the test result itself, and all timely-disclosed ENSR WET tests are already
8 admitted evidence in this matter. WET testing “methodologies and procedures” are not relevant
9 to liability once Teck Cominco has reported a violation in its DMR. Thus, no testimony that Mr.
10 Pillard is described as giving would be relevant, and Adams moves to preclude the testimony of
11 David Pillard.

15 **L. The testimony of Mike Stanoway is not relevant.**

16 Teck Cominco discloses that “A CH2M Hill employee, Mr. Stanoway will testify as to
17 biomonitoring, bioassay surveys, and WET.” Liability Phase Witness List at 6. On their face,
18 biomonitoring and bioassay surveys are not relevant to Teck Cominco’s permit violations or their
19 ongoing nature. Further, any CH2M Hill WET tests to be used as evidence speak for themselves;
20 all timely-disclosed WET tests are already admitted as evidence in this matter. Cole dec. ¶7.
21 Thus, no testimony that Mr. Stanoway is described as giving would be relevant, and Adams
22 moves to preclude the testimony of Mike Stanoway. (Adams is separately moving to preclude
23 the testimony of Mr. Stanoway because of Teck Cominco’s failure to disclose his testimony with
24 the requisite specificity.)

27 **M. The testimony of William Stubblefield is not relevant.**

1 Teck Cominco discloses that “Dr. Stubblefield will testify as to WET.” Liability Phase
2 Witness List at 7. This is the only identification given of the testimony and Dr. Stubblefield.
3 Consulting Teck Cominco’s earlier-filed witness list, Dr. Stubblefield is listed as with Parametrix
4 of Corvallis, Oregon. Defendant Teck Cominco Alaska Incorporated’s Final Witness List
5 [Docket 29], at 18. As explained above, the best evidence of any testing done by Parametrix is
6 the test result itself, and all timely-disclosed Parametrix tests are already admitted evidence in
7 this matter. Thus, no testimony that Dr. Stubblefield is described as giving would be relevant,
8 and Adams moves to preclude the testimony of William Stubblefield. (Adams is separately
9 moving to preclude the testimony of Mr. Stubblefield because of Teck Cominco’s failure to
10 disclose his testimony with the requisite specificity.)
11

12 **N. The testimony of Jason Weakley is not relevant.**

13 Teck Cominco offers Mr. Weakley to “testify as to the chemistry and treatment of Red
14 Dog water.” Liability Phase Witness List at 7. The “chemistry and treatment of Red Dog water”
15 do not appear to be relevant to Teck Cominco’s permit violations and their ongoing nature, and
16 thus Adams moves to preclude the testimony of Mr. Weakley. (Adams is separately moving to
17 preclude the testimony of Mr. Weakley because of Teck Cominco’s failure to disclose his
18 testimony with the requisite specificity.)
19

20 **VII. THE PROFFERED TESTIMONY OF US EPA OFFICIALS IS NOT RELEVANT
21 TO LIABILITY.**

22 Teck Cominco also offers two EPA officials – Eva Chun and Keith Cohon – on the
23 witness list. However, their testimony as described by Teck Cominco in the witness list does not
24 affect Teck Cominco’s liability or illuminate the ongoing nature of the violations alleged in this
25 suit, and thus Adams respectfully objects to the testimony of and moves in limine to preclude the
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1 listed witnesses Eva Chun and Keith Cohon from testifying at the liability phase at trial.

2 **A. The testimony of Eva Chun is not relevant.**

3 Teck Cominco lists Eva Chun of the Water Division at Region 10 of EPA as a witness,
4 explaining,

5 She is expected to testify regarding the regulatory action she took or participated in taking
6 in relation to the regulation of Red Dog Mine's water discharge and management. Her
7 testimony is expected to include information about the mine's operation and impacts that
8 she gathered and/or considered relating to, in particular, to the compliance orders by
9 consent (COBC) EPA gave to the mine and which she was involved. Her testimony may
10 also include the regulatory standards she believes are appropriate and present for the
Mine's water discharge.

11 Liability Phase Witness List at 3-4. Because liability hinges on what Teck Cominco reported in
12 its DMRs and what its permit requires, any "regulatory action she took or participated in taking
13 in relation to the regulation of Red Dog Mine's water discharge and management" is not relevant,
14 nor is "information about the mine's operation and impacts that she gathered and/or considered
15 relating to, in particular, to the compliance orders by consent (COBC) EPA gave to the mine and
16 which she was involved." The COBCs on their face acknowledge that Teck Cominco is
17 violating its permit after the filing of this suit – *see, e.g.*, Trial Exhibit 1002 (Exhibit 2 to Cole
18 dec.) ("At times during the months of... May-June 2004, and May-June 2005, Teck Cominco
19 violated the TDS effluent limits in Part I.A.1 of the 1998 Permit" (¶12)) – and thus information
20 "gathered and/or considered" by Ms. Chun is not relevant to liability here. Finally, the
21 evaluation of what the Clean Water Act and Teck Cominco's permit require is within the ambit
22 of this Court, not some random EPA employee chosen by Teck Cominco. Her testimony as to
23 "the regulatory standards she believes are appropriate and present for the Mine's water
24 discharge" is simply not relevant; on its face, she did not sign the COBC. Exhibit 2 to Cole dec.
25
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1 Thus, no testimony that Ms. Chun is described as giving would be relevant, and Adams moves to
 2 preclude the testimony of Eva Chun.

3 **B. The testimony of Keith Cohon is not relevant.**

4 Like Ms. Chun, Mr. Cohon is listed by Teck Cominco with the following description:

5 He is expected to testify regarding the regulatory action he took or participated in taking
 6 in relation to the regulation of Red Dog Mine's water discharge and management. His
 7 testimony is expected to include information about the mine's operation and impacts that
 8 he gathered and/or considered relating to the permits issued to the mine and the COBC's
 9 given to the mine since the late 1990's. His testimony may also include the regulatory
 10 standards he believes are appropriate and present for the Mine's water discharge.

11 Liability Phase Witness List at 4. Again, like Ms. Chun's testimony, because liability hinges on
 12 what Teck Cominco reported in its DMRs and what its permit requires, any "regulatory action he
 13 took or participated in taking in relation to the regulation of Red Dog Mine's water discharge and
 14 management" is not relevant. Any "information about the mine's operation and impacts that he
 15 gathered and/or considered relating to the permits issued to the mine and the COBC's given to
 16 the mine since the late 1990's" is not relevant here, either, where the permits and the COBCs are
 17 in evidence, can be reviewed by the Court, and speak for themselves. The COBCs on their face
 18 acknowledge that Teck Cominco is violating its permit – as noted directly above, *see, e.g.*,
 19 Exhibits 2 to Cole dec., ¶¶ 12, 14 – and thus information "gathered and/or considered" by Mr.
 20 Cohon is not relevant to liability here. Finally, the evaluation of what the Clean Water Act and
 21 Teck Cominco's permit require is within the ambit of this Court, not some random EPA
 22 employee chosen by Teck Cominco for his flattering testimony. His testimony as to "the
 23 regulatory standards he believes are appropriate and present for the Mine's water discharge" is
 24 simply not relevant; on its face, he did not sign the COBC. Exhibit 2 to Cole dec. Thus, no
 25 testimony that Mr. Cohon is described as giving would be relevant, and Adams moves to
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 27
 28

1 preclude the testimony of Keith Cohon.

2 **VIII. THE COURT SHOULD LIMIT THE TESTIMONY OF SOME WITNESSES TO**
3 **ISSUES RELEVANT TO LIABILITY.**

4 As set forth above in Sections I, II, V and VI and the cases cited therein, this is a strict
5 liability case and Teck Cominco may not “explain” or impeach its DMRs. Any testimony or
6 “explanation” is simply irrelevant under the Clean Water Act at the liability phase of trial. Thus
7 Adams respectfully objects to the testimony of and moves in limine to preclude the following
8 listed witnesses from testifying about non-relevant subjects at the liability phase at trial. *Some* of
9 the testimony described by Teck Cominco as to be offered by these witnesses may be relevant at
10 trial, but as explained below, portions of the testimony as described by Teck Cominco are clearly
11 not relevant to liability. Adams requests an Order from this Court limiting the testimony of these
12 witnesses: Mark Thompson, Kevin Brix, Mike Botz, Jeffrey Clark, Gary Coulter, Anna Echter,
13 Gretchen Miller, Kathleen Willman and James Kulas.

14 **A. Portions of the proffered testimony of Mark Thompson are not relevant.**

15 Teck Cominco offers the testimony of Mark Thompson on, among other topics, “issues
16 pertaining to maintenance of the water balance at Red Dog, policies and procedures employed
17 within his department, the history of waste water permitting, and efforts to comply with existing
18 and past permits and to obtain workable permit[.]” Liability Phase Witness List at 2. None of
19 these proffered topics is relevant in establishing or contesting Teck Cominco’s liability. The
20 “maintenance of the water balance at Red Dog” is not relevant to liability. The “policies and
21 procedures employed within his department” have no bearing on liability, which is established
22 from Teck Cominco’s own DMRs and other admissions. The “history of waste water
23 permitting,” while perhaps educational, likewise has no relevance to liability. Nor, under the
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1 strict liability scheme of the Clean Water Act, do Teck Cominco's "efforts to comply with
 2 existing and past permits." Such "efforts" or intent to comply has no relevance under a strict
 3 liability statute. Finally, Teck Cominco's efforts "to obtain [a] workable permit" are not relevant
 4 to questions of liability (although they might, arguably, be relevant to the issue of penalties).
 5 Accordingly, Adams moves to preclude Mr. Thompson from testifying at the liability phase
 6 about "issues pertaining to maintenance of the water balance at Red Dog, policies and procedures
 7 employed within his department, the history of waste water permitting, and efforts to comply
 8 with existing and past permits and to obtain workable permit[.]"

11 **B. Portions of the proffered testimony of Kevin Brix are not relevant.**

12 Teck Cominco offers the testimony of Kevin Brix on, among other topics, "water quality
 13 assessments for the protection of aquatic life," and "tocicological *[sic]* issues pertaining to
 14 effluent." Liability Phase Witness List at 3.² Since the questions to be resolved at the liability
 15 phase include only whether or not Teck Cominco violated its permits (as demonstrated by its
 16 own self-reporting to EPA) and whether or not those violations are ongoing or capable of
 17 repetition, neither "water quality assessments for the protection of aquatic life" nor "tocicological
 18 issues pertaining to effluent" are relevant, and Adams thus moves to preclude Mr. Brix from
 19 testifying at the liability phase about either issue.

22 **C. Portions of the proffered testimony of Mike Botz are not relevant.**

23 Teck Cominco offers the testimony of Mike Botz on cyanide "consistent with his
 24 declarations on file in this case and KRPC v. Teck Cominco." Those declarations focused

27

 28 ²Mr. Brix is offered as witnesses number 6 and 10. Liability Phase Witness List at 3.
 This objection pertains to both listings.

1 primarily on attacking the validity of the Total Cyanide permit limitation found in Teck
 2 Cominco's permits, and opining that the WAD cyanide test method is superior. As this is a strict
 3 liability standard, any explanation of permit violations is both unnecessary and irrelevant.
 4 Further, as the liability phase involves only violations of the Total Cyanide permit limitations,
 5 any testimony as to WAD cyanide test methods is not relevant. Further, because Teck Cominco
 6 did not appeal its Total Cyanide permit limitation, it is precluded from attacking it in this
 7 litigation. 33 U.S.C. §1369(b)(2). Thus, any testimony by Mr. Botz as to the purported invalidity
 8 or inferiority of the Total Cyanide test method is irrelevant. Adams thus moves to preclude Mr.
 9 Botz from testifying about cyanide at all; if Mr. Botz is allowed to testify, Adams moves to
 10 preclude him from 1) discussing the WAD cyanide method, and 2) criticizing the Total Cyanide
 11 method.

15 **D. Portions of the proffered testimony of Jeffrey Clark and Gary Coulter are
 16 not relevant.**

17 Teck Cominco offers Mr. Clark and Mr. Coulter for, among other testimony, "all aspects
 18 of the company's environmental management system, mineralization, and water balance issues."
 19 Liability Phase Witness List at 4.³ None of these three topics – environmental management,
 20 mineralization, or water balance – are at issue at the liability phase of this trial, and are thus not
 21 relevant. Adams thus moves to preclude Mr. Clark and Mr. Coulter from testifying at the
 22 liability phase about these issues.

24 **E. Portions of the proffered testimony of Anna Echter and Gretchen Mitchell
 25 are not relevant.**

27

 28 ³Mr. Clark is offered as witnesses number 15 and 17. Liability Phase Witness List at 4.
 This objection pertains to both listings.

1 Teck Cominco discloses that Ms. Echter and Ms. Mitchell “Will testify as to conductivity
2 based claims, WET testing and alleged WET excursions.” Liability Phase Witness List at 5.
3 None of the claims Adams will prove at trial – the end-of-pipe limitations on TDS, cyanide and
4 WET – involve conductivity testing. Further, the results of the WET tests are already admitted
5 into evidence in the uncontested DMRs and lab reports, and are the best evidence as to that WET
6 testing. Thus, the testimony that Ms. Echter or Ms. Mitchell is described as giving “as to
7 conductivity based claims” and WET testing would not be relevant, and Adams moves to
8 preclude the testimony of Anna Echter and Gretchen Mitchell on these topics at the liability
9 phase.

12 **F. Portions of the proffered testimony of Kathleen Willman are not relevant.**

14 Teck Cominco offers the testimony of Kathleen Willman “as to water balance issues and
15 facts involving specific DMR’s she prepared.” Liability Phase Witness List at 7. While Adams
16 reserves the right to challenge the relevance of Ms. Willman’s testimony as to any “specific
17 DMRs she prepared” at trial, any testimony as to “water balance issues” is clearly not relevant to
18 liability and thus Adams moves to preclude Ms. Willman from testifying at the liability phase
19 about it. (Adams is separately moving to preclude the testimony of Ms. Willman because of
20 Teck Cominco’s failure to disclose her testimony with the requisite specificity.)

22 **G. Portions of the proffered testimony of James Kulas are not relevant.**

24 Teck Cominco offers the testimony of James Kulas on, among other topics, “issues
25 pertaining to maintenance of the water balance at Red Dog, policies and procedures employed
26 within his department, the history of waste water permitting, and efforts to comply with existing
27 and past permits and to obtain workable permits.” Liability Phase Witness List at 7. None of
28

1 these proffered topics is relevant in establishing or contesting Teck Cominco's liability. The
2 "maintenance of the water balance at Red Dog" is not relevant to liability. The "policies and
3 procedures employed within his department" have no bearing on liability, which is established
4 from Teck Cominco's own DMRs and other admissions. The "history of waste water
5 permitting," while perhaps educational, likewise has no relevance to liability. Nor, under the
6 strict liability scheme of the Clean Water Act, do Teck Cominco's "efforts to comply with
7 existing and past permits." Such "efforts" or intent to comply has no relevance under a strict
8 liability statute. *EPIC*, 430 F.Supp.2d at 1010. Finally, Teck Cominco's efforts "to obtain
9 workable permits" are not relevant to questions of liability (although they might, arguably, be
10 relevant to the issue of penalties). Accordingly, Adams moves to preclude Mr. Kulas from
11 testifying at the liability phase about "issues pertaining to maintenance of the water balance at
12 Red Dog, policies and procedures employed within his department, the history of waste water
13 permitting, and efforts to comply with existing and past permits and to obtain workable permits."

17 IX. CONCLUSION

18 For the reasons set forth above, this Court should dramatically limit the number of
19 witnesses Teck Cominco is allowed to present at the liability phase, and strictly limit those
20 witnesses testimony to subjects relevant to liability.

21 Respectfully submitted this 29th day of January, 2008.

24 /S/ Luke Cole

25 Luke Cole
26 Attorney for Plaintiffs

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2
3 CERTIFICATE OF SERVICE

4 I hereby certify that on the 29th day of January 2008, a true and correct copy of the foregoing Plaintiffs' Objections to Witness
5 List and Motions to Exclude Witnesses was served, via electronic mail, on the below identified parties of record:

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